



OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO
CORRESPONDENCE

To: Members; Forensic Alcohol Review Committee

From: Laura E. Tanney
Deputy District Attorney

Re: Comments to Proposed Revisions to Title 17, dated January 5, 2006.

Date: March 16, 2006

The following are my comments regarding the proposed revisions to Title 17, submitted to committee members for review on March 8, 2006.

The forty pages consisting of extensive revisions and comments provided by the Regulations Coordinator require greater scrutiny and review than can be accomplished in the one week period provided to us. I request additional time for review and comment. I further request that any future proposals be submitted to committee members at least three weeks prior to the deadline for posting on the agenda.

A. Enforcement

A critical issue involved in Title 17 revisions is how the regulations will be enforced now that laboratories are no longer licensed by DHS. An assumption is made on page one that enforcement of the regulations will be concluded through the courts. Does this refer to administrative courts? If not, how will enforcement be accomplished and under what authority? Will all complaints and allegations have to be litigated in court? What is the cause of action? What fiscal impact will this have?

In a criminal trial, the California Constitution guarantees that all relevant evidence is admissible unless it is barred by the federal constitution. In other words, there is no independent state action for the suppression of evidence. Thus, the only mechanism for enforcement of these regulations during a criminal trial is for the court to allow the evidence and then allow cross-examination of the analyst as to whether Title 17 was followed. The jury would then decide how much weight to give the evidence.

B. Scope

Health and Safety Code section 100700 requires “Laboratories...to comply with ... [Title 17.]”

Any attempt to expand the regulations to include law enforcement officers and field locations is inappropriate.

C. Definitions

I have concerns about proposed revisions to the definitions used in Title 17. To deviate from the current definitions, which tend to be literal definitions of the terms, to the proposed definitions may lead to confusion and result in unintended consequences.

1215.1(b) While I recognize that the term “Forensic Alcohol Analysis” is used extensively in the regulations to refer to blood, urine and tissue analysis, the common use of the term “Forensic Alcohol Analysis” includes any testing for the determination of blood alcohol in criminal investigations. Extensive case law uses the term to include a determination of blood alcohol levels through breath alcohol analysis. Finally, Health and Safety Code section 100700 uses the term to include testing “blood, urine, tissue or breath” To change the definition in the regulations would lead to unnecessary confusion and uncertainty.

Perhaps a better alternative would be to use limiting language in the regulations when referring to blood, urine and tissue testing.

1215.1(c) “Breath Alcohol Analysis” is another term of art used as a method to determine the concentration of alcohol in a person’s *blood* as evidenced by the concentration of alcohol in alveolar air. This is important because criminal statutes are written in terms of *blood alcohol content*, not breath alcohol content. Thus, the change in definition would be confusing and may lead to unintended consequences.

1215.1(e) “Forensic Alcohol Laboratory”

A jail is not a forensic alcohol laboratory and under no circumstances should there be any attempt to classify it as such or to classify law enforcement officers who are trained to operate breath testing apparatus as “employees” of a forensic alcohol laboratory. These regulations regulate laboratories and forensic analysts employed by them, not law enforcement officers. Any attempt to expand the scope of

regulations beyond that which is authorized is a misuse of this committee's authority.

There is no authority for a proposal that requires forensic alcohol laboratories to oversee the *use* of breath alcohol testing instruments. This could potentially have enormous fiscal implications that inures to the benefit of laboratories and the detriment of police agencies. *It may also unnecessarily affect the ability to collect evidence necessary to the prosecution of criminal cases.*

1215.1(f) “Forensic Alcohol Analyst”

The regulations cannot attempt to circumvent the statute that authorizes adoption of regulations to ensure the qualifications and competency of “forensic laboratories” and their “employees” by trying to expand the definitions of those terms beyond that contemplated by the legislature at the time the statute was enacted.

Other Definitions Proposed

The scope of the regulations is limited to laboratories. Thus, definitions of “Agency” and “Employee” are problematic.

Perhaps, the definition of “ _ Standard” should not include “water” and just refer to a “solution...”

The term “Procedure” is a very general term and should not be used as indicated to refer to the limited breath alcohol analysis.

D. Article 2 - Requirements for Forensic Alcohol Laboratories

1216.1

Again, I emphasize that these are regulations for laboratories. The definition of forensic alcohol laboratory does not extend to operation of breath alcohol analysis instruments used by police officers in the field.

1216.2

A forensic alcohol analyst as used in these regulations is, by definition, an employee of a forensic alcohol laboratory. (Clearly, regulations cannot limit law enforcement officers who use breath alcohol testing apparatus to those having a science degree and chemistry training.)

C. Article 3 – Licensing Provisions

The repeal of these provisions is appropriate.

D. Article 5 - Collection

I have concerns regarding the amendments to change accuracy from grams per 100 ml (of blood) , or grams percent to grams per 210 liters (of breath). (Changing volume of blood to equivalent volume of alveolar air.) (See 1219.3(b) and 1221.4(a)(1)(A).)

E. Article 7 – Requirements for Breath Alcohol Analysis

The proposed regulations would place more stringent limitations on the ability of officers to operate breath testing equipment in the field or in jail house settings than do the current regulations.